No. 392.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION (a Corporation)
Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD J. CURTIS, Deceased,
Defendant in Error.

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PETITION FOR REHEARING

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

Filed, March..... 1898

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Plaintiff in Error.
vs.
J. K. DuBOIS, as Administrator of the Estate of EDWARD J. CURTIS, deceased.
Defendant in Error.

Petition for Re-hearing.

The plaintiff in error respectfully asks for a re-hearing herein.

The action was brought by the defendant in error, as administrator of the estate of Edward J. Curtis, deceased, to recover the sum of $6,000, on a certificate of insurance issued by the plaintiff in error to the said Curtis.

The defense interposed to the action was that the deceased had failed and neglected to pay an assessment duly levied upon him by the plaintiff in error in accordance with the terms of his certificate, and that the certificate had, in consequence thereof, lapsed and become void. The assessment in question became due

and payable on June 1st, 1893, and from that time to his death, December 29th, 1895, a period of over two and a half years, the deceased neither paid nor made any attempt to pay said assessment, or any subsequent assessment.

Judgment was rendered in the lower Court in favor of the defendant in error, for the sum of $6530, on the ground that the notice of the assessment given the deceased did not comply with the law, in that, the law required a notice of thirty days to be given the deceased of the falling due of an assessment, and the notice in question was not a thirty days' notice.

The opening brief of the plaintiff in error, filed in this Court, however, shows conclusively that the Court below erred in holding that the notice given the deceased was not a thirty days' notice, and that the decisions are practically unanimous that such a notice is a thirty days' notice. The number of cases cited by the plaintiff in error on this point was so large, and the decisions so clearly established the error of the Court below, that counsel for the defendant in error practically abandoned all effort to support the judgment in this Court, and, in his brief of twenty-seven pages, devoted but half a page to the judgment, and then merely for the purpose of citing a single decision which has been disapproved of by every Court whose attention has been called to it, and particularly by the Courts of New York whose decisions enter into and form part of the contract, and govern the construction of the certificate of insurance.

And in the reply brief filed by the plaintiff in error it was made clear that the law which the lower Court, taking judicial notice of the laws of New York, had held applicable to the certificate and as requiring a thirty days' notice, had been repealed prior to the assessment, and that the law which did apply to the certificate had been fully complied with by the plaintiff in error.

Counsel for the defendant in error, abandoning all hope of controverting the contention of the plaintiff in error as to the unsoundness of the judgment, exerted himself in his brief to prevent a consideration of the judgment by this Court upon purely technical grounds; and, in its opinion delivered herein on February 7th, 1898, this Honorable Court held the objections of the defendant in error to a review of the judgment by this Court to be well taken, and declared that the record presented no question for the consideration of this Court.

The particulars in which this Court held the record insufficient were :

1. "The agreed statement of facts is, therefore, merely a report of the evidence, and, whether it appears in the opinion of the Court, or in the bill of exceptions, it cannot be deemed a special finding."

2. "The insufficiency of the records in the present case is still further disclosed in the assignments of error, which are directed mainly to the opinion of the Court, and cannot be considered, since the opinion of the Court is no part of the record."

We respectfully submit that in both these particulars the opinion of this Honorable Court is erroneous, and

that the record is sufficient, not only to authorize this Court to review the judgment, but to require a reversal of the judgment, and we therefore ask for a rehearing herein.

The grounds upon which the opinion declares the agreed statement of facts to be insufficient, is that the statement consists in part of an affidavit of one Amsden, and therefore does not purport to be a statement of the ultimate facts, but merely of evidence, and the opinion of the Court in *Kentucky Life and Accident Insurance Company* vs. *Hamilton*, 22 U. S. App. 559, is quoted from as holding "a similar record in that court," not to be an agreed statement of facts.

We think, however, that there is a clear distinction between the record in that case and the record in the present case, and that the language quoted from the decision in that case is not applicable to the record presented to this Court.

In the case in 22 U. S. App. it appears the agreed statement of facts set out "numerous applications, notices, letters, policies, charters and by-laws therein referred to as having been read upon the hearing," and it was said by the Court there, "an agreed statement of facts which will be accepted as the equivalent of a special finding of facts, must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found, is not within the rule stated in *Supervisors* vs. *Kennicott*, *supra*.

In the present case the agreed statement of facts expressly declares that the affidavit of Amsden "shall constitute a part of this agreed statement of

facts." The affidavit itself does not, as was complained of in the case just referred to, consist of a mass of evidence, but is merely a statement of but a single fact, namely : That on the first day of June, 1893, a notice of the assessment known as mortuary call No. 68, under the certificate or policy of Edward Jay Curtis, was mailed said Curtis to his address, Boise City, Idaho, and that said notice required the said Curtis to pay the amount of the said assessment on or before July 1st, 1893. This is the only fact set forth or mentioned in the affidavit, and it is an ultimate fact. What difference it can make, whether such fact appears in the body of the agreed statement of facts or as a separate and distinct statement which is made part of the agreed statement by reference we cannot perceive. The affidavit in question is not evidence tending to prove a fact ; it is a statement of the fact itself, and a statement as clear and direct as any of the statements contained in the body of the agreed statement of facts. If a special finding of facts had been filed by the lower Court and contained a finding upon the question of the giving of notice to Curtis of the falling due of mortuary call No. 68, such finding would not and could not have been clearer or more direct than the statement of Amsden. We would earnestly ask the Court that it again carefully examine the affidavit of Amsden, and observe how the affidavit is confined to but a single fact, namely the giving of notice of call No. 68 to Curtis. and how directly such fact is stated, and how impossible it would be to draw a finding in regard to the giving of the notice which would be

more direct or ultimate than the statement of Amsden.

In the case of *Supervisors* vs. *Kennicott*, 103 U. S. 554, cited by this Court to the point that the agreed statement of facts in this case is insufficient, there is nothing whatever said as to the sufficiency or insufficiency of any agreed statement of facts.

In *Lehnen* vs. *Dickson*, 148 U. S. 71, likewise cited to the same point there was no agreed statement of facts, and no remarks as to the force such a statement should take.

In that case, however, the Court did declare: "It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* vs. *Kennicott*, 103 U. S. 554.

Doubtless, also, cases may arise in which without a formal special finding of facts, there is presented a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts in which this Court ought to and will review the ruling. Thus in *Insurance Company* vs. *Tweed*, 7 Wall. 44, where on the agreement in this Court counsel agreed that certain recitals of fact made by the trial court in its opinion or (reasons for judgment), as it was called, were the facts in the case, and might be accepted as facts found by the Court, it was held that as they could have made such agreement in the Court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based and upon an examination it was further held

that they did not support the judgment, and it was reversed."

In *Supervisors* vs. *Kennicott*, *supra:* there was an agreed statement of facts, and a general finding for the plaintiffs in the action. In the Supreme Court the defendant in error objected to an examination of the case upon the merits upon the ground that the finding of the Court was in form general and not special.

Speaking of this contention, the Court said: "This record shows distinctly that the Court was only required to determine whether in law, on the agreed facts, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the Court found the issue in favor of the plaintiffs, but that, when read in connection with the bill of exceptions is no more than a declaration that the Court found the law to be in favor of the plaintiff on the case as stated," and the Court thereupon proceeded to review the judgment and to declare: "The single question, therefore, was presented to the Court, whether on the agreed facts the county and its sureties were liable in law to the extent of their bond for the accumulation of interest or the balance of the mortgage debt. The judgment was to the effect that they were. In this we think there was error." The judgment was accordingly reversed.

This case falls exactly within the rule laid down and followed in the two cases last quoted from. The facts having been agreed to by the parties, there was no fact for the Court below to determine and there were presented to the Court below, as there are presented to

this Court, simply questions of law, namely, whether the insured was entitled to a formal notice of the assessment which became due on June 1st, 1893, and if he was entitled to such notice, whether the notice sent him complied with the law.

Attention is also seriously called to the clear distinction which can be drawn between the case at bar, and the case of *Raimond* v. *The Parish of Terrebone*, 132 U. S. 192, cited by this Honorable Court in its opinion.

A mere perusal of the statement in that case shows that the statement of facts depended upon therein, was in no respects similar or analogous to the agreed statement of facts in this case. The situation and the distinctions between that case and the present case are most clearly and distinctly summed up in the following language from Judge Gray's opinion in the case cited:

" In the present case the pleadings present issues of " fact; there is no bill of exceptions; the so-called " statement of facts is mainly a recapitulation of evi- " dence introduced by the parties at the trial. *The* " *case was not submitted to the decision of the Court upon* " *that statement only, but the Court made a further find-* " *ing as to what took place at the trial.* That finding " merely states that the parties admitted, so far as the " facts are stated in a certain reported opinion of the " Supreme Court of Louisiana, they were a correct " statement of the facts of this case, but that each " party claimed that there were additional facts as to " which there is no finding. * * * In short, there " is nothing in the present case which can be called in " any legal or proper sense either a statement of facts

" by the parties or a finding of facts by the Court, and " no question of law is presented in such a form as to " authorize this Court to consider it."

Assuming, however, for the purposes of the argument, that the statement of Amsden can form no part of the agreed statement of facts, the plaintiff in error is still clearly entitled to a reversal of the judgment.

The agreed statement of facts expressly declares:

"That said Edward J. Curtis failed to pay an assessment or mortuary call or premium, known as mortuary call No. 68 in the sum of $33.96 which became due, according to the terms of said policy of insurance, on the first day of July, 1893, and that the same has not been paid by said Edward J. Curtis, or any other person or persons for him; and that said non-payment was not condoned or acquiesced in by defendant; that other assessments, mortuary calls and premiums have become due and payable since said mortuary call No. 68, but none of them have been paid." Transcript, p. 48.

The certificate or policy of insurance is made a part of the complaint, and provides that the company will pay the legal representatives of the insured the sum of $6,000, "upon the further consideration of the payment of all mortuary premiums, payable at the home office of the association in the City of New York, or to an authorized collector, *within thirty days from the first week day* of the *months* of February, April, *June*, August, October and December of each and every year during the continuance of the certificate or policy of insurance, and subject to all the provisions, requirements and benefits stated on the second page of this cer-

tificate or policy of insurance, which are hereby referred to and made a part of this contract." Trans., p. 15.

Among the provisions and requirements thus made a part of the certificate, and upon the performance of which by the insured, the payment of the $6,000 is conditioned, are the following:

"In the event of the non-receipt by a member of a mortuary premium notice on or before the first week day of February, April, *June*, August, October and December of each and every year, it shall be, nevertheless, a condition precedent to the continuance of this certificate or policy in force, that an amount equal to the amount of the next preceding mortuary premium paid, *shall be paid said Association within thirty days from the first week day of* February, April, *June*, August, October and December of each and every year. *Notice that a mortuary premium is payable* to said Association *on the first week day of* February, April, *June*, August, October and December of each and every year, *is hereby given and accepted, and any further and other notice is expressly waived.*" Trans., pp. 20–21.

"This certificate or policy of insurance is also issued and accepted subject to the express condition that if any of the payments stipulated in this contract shall not be paid on or before the day of the date as provided in this contract, at the home office of the Association in the City of New York, or to a duly authorized collector of the Association, * * * then and in each and every such case the consideration of this contract shall be deemed to have failed, *and this certificate or policy of insurance shall be null*

and void, and all payments made thereon shall be forfeited to the Association." (Trans., p. 25.)

It will thus be seen from facts appearing of record that the payment of the $6,000 is expressly conditioned upon the payment by the insured of a mortuary premium within thirty days from the first day of June of each and every year; that in the event of the insured not receiving notice of a mortuary call on or before the first day of June it "shall be nevertheless a condition precedent to the continuance of this certificate or policy of insurance in force that an amount equal to the amount of the next preceding mortuary premium shall be paid said Association within thirty days from the first week day of June * * * of each and every year; that the insured expressly waived any other notice than that given by the certificate itself of the falling due of an assessment; and that no attempt has ever been made to pay call No. 68.

It is immaterial therefore whether notice of the falling due of assessment No. 68 was sent the insured or not. Under the provisions of the certificate of insurance the deceased not only was not entitled to notice of the falling due of the call, but he had expressly agreed that in the event of the non-receipt of notice he would pay a call to the association within thirty days of the first day of June of each and every year. He did not pay or attempt to pay call No. 68 within thirty days of the first week day of June of the year 1893, and, therefore, by the terms of the certificate, the certificate ceased to exist.

It is also provided in the certificate that: "This contract shall be governed by, subject to and construed

only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said Association in the City of New York (Trans., p. 24).

The decisions of the Courts of New York enter into and form part of the certificate of insurance and are binding and conclusive upon the Courts of the United States, and the Courts of the United States take judicial notice of such decisions. See opening brief of plaintiff in error herein, pages 10–11.

It is elementary law that a party may waive the provisions of a law intended for his benefit, and, in the absence of a prohibition in the Statute, the insured had a right to waive the giving of a notice to him on each occasion of the falling due of an assessment The statute applicable to this case (see opening brief of plaintiff in error, pages 2–4, and opening brief of plaintiff in error, pages 12–13) not only does not prohibit a waiver of notice but does not require notice to be given. All that the act does in reference to notice is to state what a notice shall set forth.

Under the decisions of the courts of New York which thus enter into and form part of the certificate, and in which state the contract of insurance was made, the insured had a right to waive notice of the falling due of an assessment and was not entitled to notice of assessment or call No. 68.

In *Roehner* vs. *Knickerbocker Life Ins. Co.*, 63 N. Y. 160, 163, it was declared by the Court of Appeals of New York, construing a policy substantially similar as to the provision for forfeiture for non-payment of premiums to the present policy:

"The argument of the appellant seems to reach to the extent that there could be no forfeiture of the policy by the defendant unless the intention so to do was, after the failure to pay the premium, made known by it to the holder of the policy.

"It is, however, well settled that on the failure of the insured to pay the premium on a policy like this, at the time therein stipulated therefor, it becomes lapsed and void. It is then no longer a contract enforceable against the insurer. In the case in hand it was the agreement between the contracting parties that the consideration for the undertaking of the defendant was that the insured had paid it in hand a certain sum at the making of the contract, and should on a certain day in each year thereafter, on or before a certain hour of that day, pay them the same sum. And it was expressly agreed that the omission to pay the same on the day named should then and thereafter cause the policy to be void. Considering the nature of the contract of life insurance, and how it binds the owner to a continuance of it, while the insured is not by the terms of the policy bound to pay, but has the privilege to do so or not, this was not an unwise condition for the defendant to insert. It was not illegal, nor can we say it was against public policy. When the contract was accepted upon those terms, the condition was an important part of it, and the insured was bound to a strict performance, before there could be a claim set up for a benefit under it, unless such performance was legally waived or modified. If the premium was not paid when the day for payment came, the policy was void, for the par-

ties to it have said so it should be. The forfeiture results from the non-payment alone, and from no other act."

Failure to make payment of a *premium*, or calls, at the office fixed for the payment thereof by the policy or certificate, the policy or certificate providing that in the event of such failure, the policy or certificate shall cease and become void, has always been held by the Court of Appeals of New York to terminate the policy without notice of any kind to the insured.

Robertson vs. *Metropolitan Life Ins. Co.*, 88 N. Y. 541.

Attorney-General vs. *Continental Life Ins. Co.*, 93 Id. 70, 73.

Holly vs. *Metropolitan Life Ins. Co.*, 105 Id, 437.

Fowler vs. *Metropolitan Life Ins. Co.*, 116 Id, 389.

The same conclusion has been reached by the Supreme Court of the United States.

New York Life Ins. Co., vs. *Statham*, 93 U. S. 24.

If, however, the affidavit of Amsden is merely matter of evidence and cannot be considered as part of the agreed statement of facts, and the agreed statement without such affidavit is insufficient, in the opinion of this Court, to establish the right of the defendant in error to a judgment in its favor, the judgment should clearly be reversed upon the ground that the agreed statement of facts is insufficient.

In the case of *The E. A. Packer*, 140 U. S., 360, 3,

it was said: "The rule is general that wherever the trial court finds the facts and conclusions of law therefrom, it is bound to find every fact material to its conclusions, and a refusal to do so, if properly excepted to is a ground for reversal. Thus, in cases tried by the Court without a jury, in Rev. Stat., 649 and 700, the findings of the Circuit Court Judge are conclusive upon this Court, and the power of this Court extends only to the sufficiency of the facts found to support the judgment. (*Tyng* vs. *Grinnel*, 92 U. S., 467) and if not sufficient the case may be remanded for trial upon other issues involved therein. (*ex parte French*, 91 U. S., 423) The findings of the Court under these sections are treated as a special verdict, and are guaged by the rules applicable to them. (*Norris* vs. *Jackson*, 9 Wall., 125; *Copelin* vs. *Phœnix Ins. Co.*, 9 Wall., 461; *Wayne County Supervisors* vs. *Kennecott*, 103 U. S., 554) and as was said in *Graham* vs. *Bayne*, 18 How., 60, 63, if a special verdict be ambiguous or imperfect, if it find *but the evidence of facts, and not the facts themselves*, or finds *but part of the facts in issue*, and is silent as to others, *it is a mistrial, and the court of error must order a* VENIRE DE NOVO. *They can render no judgment on an imperfect verdict or case stated.* Under a similar method of procedure in some of the States it is held that the findings must contain all the facts and circumstances necessary to a proper determination of the question involved, and in default thereof the judgment of the Court below will be reversed, and the case sent back for a new trial."

One of the defenses in this case, is that notice of the falling due of an assessment, No. 68, was duly given

the insured, and that the insured failed to pay the assessment within the time fixed for the payment thereof, and that by reason of such non-payment the certificate of insurance lapsed and became void. These matters are specially pleaded in the answer filed by the defendant in the action, the plaintiff in error here. If the affidavit of Amsden cannot be considered part of the agreed statement of facts it results that the agreed statement is wholly silent upon one of the issues in the case, namely: whether notice of the falling due of the assessment in question was given the insured.

As is shown by the cases cited in the closing brief herein of the plaintiff in error, an agreed statement of facts takes the place of a special finding and is to be tested by the same rules as a special finding. Thus tested, if the affidavit of Amsden must be excluded from consideration, and the agreed statement is insufficient to entitle the plaintiff in error to a reversal, the statement is fatally defective, and the Court below was without authority to render the judgment complained of, and, to quote again the opinion in The E. A. Packer case, *supra*, "it is a mistrial, and the court of error must order a *venire de novo*. They can render no judgment on an imperfect verdict or *case stated*.

In relation to the assignment of errors we do not ask the Court to review any evidence or any rulings of the Court below. All that we contend for is that the agreed statement of facts does not justify the judgment, and as the judgment is simply a judgment in favor of the plaintiff in the action for the amount of the policy and interest and costs, assignments that the Court erred in ordering judgment for the plaintiff,

and that it erred in not ordering judgment for the defendant would certainly seem to be sufficient.

The case of *Supervisors* vs. *Kennicott*, *supra*, is directly in point. In that case the assignment of error was simply that the Court erred in giving judgment for the plaintiffs, and it was held that the assignment was sufficient, and as we have seen, the Court reviewed the judgment, declared that the agreed statement of fac s did not justify it, and ordered a reversal.

If such assignments are not sufficient then the more specific assignments must be sufficient for they cover every point upon which the Court below must have based its decision in order to arrive at the judgment.

For instance the agreed statement of facts show that there became payable by the insured within thirty days from June 1st, 1893, an assessment upon his certificate, and that he failed to pay the same. The certificate which is made part of the complaint declares that non-payment of any assessment within the time fixed for the payment thereof voids the certificate. When the Court, therefore, rendered judgment for the plaintiff below, it must have held "that the failure by the deceased to pay the assessment or mortuary call No. 68 did not operate as a forfeiture of the policy of insurance in this case, and that notwithstanding such failure and default, that said policy of insurance remained in full force and effect." An assignment of error that the Court erred in so deciding, specifically setting out the point (Transcript, page 84) is certainly a proper assignment of error.

This honorable Court is mistaken in saying that the

assignments of errors are to the opinion of the Court below. The assignment of errors takes up every point upon which the Court below must have decided adversely to the plaintiff in error in order to arrive at its judgment, and alleges error in each such respect. If the assignments of error are not sufficient we are at a loss how to draw an assignment of errors that will meet the approval of this Court. We earnestly invite the Court to a re-examination of the assignments of error.

It is said in the opinion of this Court that, "The laws of the State of New York appears to provide for different classes of life insurance associations, but there is no finding as to the particular class to which the defendant belongs, and this Court is not required to ascertain the fact by an examination of the evidence in order to determine the law applicable thereto."

It does not require an examination of the evidence to ascertain to which class of life insurance associations the plaintiff in error belongs. One of the classes mentioned in the laws of New York is companies "transacting the business of life or casualty insurance upon the *co-operative or assessment plan*." See closing brief of plaintiff in error, pages 2–3.

The certificate of insurance is made a part of the complaint, and shows upon its face that the plaintiff in error transacts business upon the co-operative or assessment plan, one of the conditions of the certificate being that, "within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate or policy of insur-

ance, there shall be payable to the Association a mortuary premium for such an amount as the executive committee of the Association may deem requisite, which amount shall be at such rates, according to the age of each member, as may be established by the Board of Directors."

It is therefore an admitted fact in the case that the plaintiff in error transacts business upon the co-operative or assessment plan.

We think the plaintiff in error is clearly entitled to a reversal of the judgment and that a re-hearing should therefore be granted.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.